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ABSTRACT

This paper describes a grassroots effort by one mid-sized midwestern community which led to the development of a voluntary cooperative network of community service providers offering court-referred divorce mediation services to highly conflicted divorcing families. Issues addressed in this paper are: (1) the difference between a court-referred service and a voluntary private practice service, and which would be more effective; (2) whether the number of divorcing families using the litigation process was sufficient to justify a court-connected program; (3) the legal basis for court-mandated mediation; (4) structuring an effective program; and (5) program evaluation. Included are lists of questions, concerns about the program, suggestions for improvement, and opinions about the best aspects of the program from attorneys. The paper concludes that the court-referred divorce mediation program has been quite successful and should continue without significant changes at this time. Appended are a set of standards and procedures for the divorce mediation, a program termination record and other relevant forms, case review procedures, a summary of records, and a divorce mediation program flyer. (NB)

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Enriching Divorced Families Through Grass-Roots Development of Community-Wide Court-Referred Mediation Services

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Running head: ENRICHING DIVORCED FAMILIES THROUGH MEDIATION

Abstract

This paper describes how a mid-sized midwestern community responded to the need for helping heavily conflicted divorcing families make a healthier reorganization adjustment than would likely occur through the litigation process. A grass-roots effort led to development of a voluntary cooperative network of qualified community service providers offering court-referred divorce mediation services from a variety of backgrounds and service audiences. The following questions are addressed: (1) What is the difference between a court-referred service and a voluntary private practice service, and which would be more effective? (2) Are there really that many divorcing families utilizing the litigation process to justify a court-connected program? (3) Do courts have the right to intervene in private family matters? (4) What is the best structure for organizing the program and keeping it working effectively? and (4) Does the mediation program actually help divorcing families?

Enriching Divorced Families Through Grass-Roots Development of Community-Wide Court-Referred Mediation Services

Increased public discussion of family problems, as well as continuing research (Hale, 1983), validate the trauma experienced by divorcing families in our society. Studies (Bennett & Hale, in press; Goetting, 1981) continue to show initial disruption of children's functioning as they experience parental divorce, though our understanding of the long-term consequences for children is still debatable. With our divorce rate apparently leveling off at a high rate, demographer Paul Glick (1985) has projected that at least 40% of today's children will live with divorced parents during childhood. Our society is rightly concerned about providing adjustment support for divorcing families. Current thinking among family relations professionals promotes the possibility of healthy adjustments for divorcing families who have effective support resources. The trauma of the divorce crisis can become an experience of new growth and maturity for all family members.

What support services could help facilitate this positive outcome? Possible options include reconciliation therapy, divorce therapy for adults and children, educational seminars for adults and children, financial counseling, mediation of divorce and post-divorce issues, arbitration of divorce and post-divorce issues, custody evaluations, psychiatric evaluations, and divorce adjustment research. Informal analysis of our local community revealed that many of these services were available to divorcing families, though increased awareness of services was

probably needed. One service not available in our community was divorce/post-divorce mediation. Mediation is defined as

> . . . the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives. (Folberg & Taylor, 1984, pp. 7-8)

With the belief that mediation is a very valuable service for divorcing families, the initiation of such a service began. This paper will address the following questions in regard to our local needs:

1. What is the difference between a court-referred service and a voluntary private practice service, and which would be more effective?
2. Are there really that many divorcing families utilizing the litigation process to justify a court-connected program?
3. Do courts have the right to intervene in private family matters?
4. What is the best structure for organizing the program and keeping it working effectively?
5. Does the mediation program actually help divorcing families?

Court-Referred Divorce Mediation Services/Private Practice

Our first decision was to select between a court-referred

program and a private practice voluntary service. Because divorce mediation was still a rather unfamiliar concept in this region, a court mandate seemed to be the most effective method of gaining people's attention so that they could learn about the process. Court intervention into the divorce process also has an historical basis.

The concept of using a third neutral party to help resolve interpersonal disputes is not new. It began in ancient China and is used extensively today in many countries, including the United States. Until recently, however, mediation was used in the United States for labor relations and similar issues but was not used in divorce (Folberg & Taylor, 1984). The lack of use in divorce cases might be explained by the historical linkage of marriage with the church rather than the state. With the Christian movement came the concept of marriage as a sacrament, essentially undissolvable and definitely controlled by the church. During the Protestant Reformation, Martin Luther initiated the change in control of marriage from religious to civil. Divorce eventually became controlled by the government, but carried with it the idea of sin and transgression which unavoidably makes it an adversarial process. Successful mediation is very difficult under fault grounds; recent no-fault laws finally opened the door to cooperative legal divorce settlements. John Milton had argued that divorce should be justified by incompatibility, consistent with many current beliefs. Perhaps we are close to the time when "divorce will be declared a constitutionally protected civil right

instead of an area wholly dictated by the power of the individual states" (Brown, 1982, p. 4), a practice consistent with the ancient Hebrew view of divorce.

But today the control of marriage is still in the hands of the states. The function of the court system is to bring peace and harmony in society. The state has the responsibility for monitoring the initiation and dissolution of marriage and for protecting the welfare of children. Though courts can readily dissolve the marriage relationship, they cannot legally dissolve the parenting relationship unless such dissolution is proven to be in the best interest of the child. A meaningful goal of courts is to help reconcile parents to a cooperative parenting relationship.

A revolutionary concept of the legal profession and behavioral scientists working together for the welfare of families was brought to life with the 1939 establishment of the Family Conciliation Court of Los Angeles. The spread of this concept to other locations was slow until recently (Elkin, 1982), and seems to be limited to large metropolitan areas. The current objectives of the model Los Angeles program are as follows:

1. Provide a non-adversarial means of settling conflict within the Superior Court, maximizing participation of the parties involved and giving them maximum responsibility for their own individual and collective lives.
2. Help families reconcile and divert from the divorce process.
3. Help families going through the divorce process handle

the crisis of dissolution effectively and settle their differences amicably.

4. Make recommendations regarding underage couples applying for marriage.

5. Review public and private policy and programs to make recommendations for the strengthening of family life, both inside and outside the Court system.

(McIssac, 1982, pp. 131-2)

One of the five basic services provided is custody/visitation mediation. As early as 1955, a form of conciliation counseling similar to present divorce mediation was utilized in the Los Angeles program, though the term "mediation" was not used until 1974. The use of court-referred divorce mediation during the 1970's in such states as Arizona, California, Connecticut, Massachusetts, Michigan, Minnesota, Wisconsin, and Virginia has led to state-wide legislation in an increasing number of states (Brown, 1982). Court-referred mediation services became firmly established during the 1970's for many courts who had existing conciliation court services. The 1980's are seeing an expansion of mediation being added to conciliation court services as well as the creative initiation of mediation in courts lacking conciliation court services. Some courts such as Charlotte, North Carolina (Senate Bill, 1983) and Newton County, Indiana (Proposal, 1982) have contracted with a community agency to provide court-referred divorce mediation services. Though using contracts with community agencies affords less judicial control of

the service than does having a court agency, utilizing existing resources in the community is the only economically feasible means of providing mediation services in many smaller courts.

Mediation in the private sector was also initiated in the 1970's. O. J. Coogler (1978) founded the Family Mediation Association in January 1975 and mediated his first divorce settlement that month. His continued efforts developed a structured mediation process which provided the foundation for identifying divorce mediation as we know it today.

The primary distinction between the process of court-referred and private practice mediation seems to be the limit on issues mediated: private practice mediators generally mediate all issues in a divorce settlement (custody, visitation, child support, maintenance, and property division), while court-referred mediation is generally restricted to custody and visitation issues only. Meyer Elkin (1982) has suggested that we find ways in which private practice mediators and court-referred mediators can be complimentary rather than competitive. Our local program development seems to lead in that direction.

Substantiating the Need

The investment of resources into developing any service demands a feasibility study. Already calculated divorce statistics for our county do not include sufficient detail to determine how many contested custody/visitation cases are likely to be filed in a given period. Thus, a review of individual files was necessary. Carol Bennett (Bennett & Hale, in press) reviewed

580 cases (91% of the total filed) of divorce petitions filed between June 1, 1983 and May 31, 1984 in order to provide a descriptive profile of divorcing families in McLean County. Of the 580 cases, 200 (34%) had no children. Eighty-six of the 380 families with children had adult children or step children which would not include legal custody decisions, leaving 51% of the cases filed including custody decisions for minor children. Of these 294 custody cases, 73 (25%) were originally filed as contested custody cases. Nine (12%) of the contested cases were filed by indigent clients.

McLean County, with a population of approximately 119,000, had at least 649 minor children experiencing parental divorce in one year. Of the 649 minor children, 61% (487) were under 12 years of age with over half of those (297, 37% of the total) being under 6 years of age. Approximately 163 of those children were subjected to some degree of parental fighting through the courts to determine their custodial living arrangements. With our knowledge of the negative impact of parental fighting upon children's adjustment to divorce, this number seems painfully high.

In addition to these children experiencing the court proceedings of an initial divorce, an unknown number of children experienced post-divorce court fighting of parents. During the same time frame in which 662 divorce petitions (including 23 foreign judgment transfers) were filed, 872 post-divorce petitions were filed. Though these files were not reviewed, we can assume a

large percentage involved parents relitigating unresolved issues of custody, visitation, or child support. Property settlements are rarely open to relitigation, and spousal maintenance is awarded in only approximately 2% of the cases.

We concluded that a court-referred mediation program in our county would be utilized. According to our records for one year, approximately 73 initial cases would be referred to mediation because of contested custody. No accurate estimation of the 872 post-decree cases involving custody or visitation issues is available; but less than half is a large number. Providing mediation services to these highly conflicted families with young children will hopefully improve the coparenting and facilitate a healthy adjustment for the children who are the innocent victims of parental hostilities. In addition to the objective data, informal observations of judges, attorneys, and mental health professionals validated the need for a service to help divorcing families resolve conflicts cooperatively through mediation rather than combatively through courtroom litigation.

Legal Basis for Court-Mandated Mediation

When our program began, no specific statutory authority to order custody/visitation mediation existed in Illinois. The purposes of the Illinois Marriage and Dissolution of Marriage Act are strong support for such an approach. The Act seeks to safeguard family relationships, to promote the amicable settlement of disputes, and to mitigate the potential harm to spouses and their children caused by the process of legal dissolution of

marriage. §102, ch. 40 Ill. Rev. Stat. (1983). See also, Uniform Marriage and Divorce Act (U.L.A.) §102. These purposes are well served by the mediation approach.

The court has the power to order a conciliation conference. §404, Ch. 40 Ill. Rev. Stat. (1983). While this provision is considered to be for the purpose of seeking a reconciliation so there will be no divorce, it can be argued the power may be exercised to promote an agreement on some single issue within the divorce, such as custody or visitation.

The court also has the statutory authority to appoint a social service agency to supervise both custody and visitation after the divorce. §608, Ch. 40 Ill. Rev. Stat. (1983). Sometimes an objective umpire is needed to help both parents adjust to the court's custody and visitation order. If the court may intervene in this way after a bitterly fought custody battle, then why not intervene at an earlier stage to ameliorate the anger and hostility of the parents and encourage them to reach a parenting agreement that will serve the child's best interests? Mediation has this potential for success.

It is also helpful to consider the purpose of Supreme Court Rule 218, §218, Ch. 110A Ill. Rev. Stat. (1983), which provides the court may hold a pretrial conference in any civil case. The pretrial may assist in simplifying issues and disposing of the case, or some part of it. A judge may, arguably, order a mediation conference with a trained mediator as a substitute for a pretrial conference. This does not mean the mediator is a substitute for the judge, but

does mean the judge is using an available method of alternative dispute resolution to narrow issues and perhaps even prompt a settlement of the contested issues. This approach fits within the spirit of the Supreme Court Rule.

The absence of a specific statutory mandate for mediation was not viewed as an obstacle because the provisions discussed above are strong persuasive authority for the concept of mediation in custody and visitation disputes. The authors concluded a judge could order mediation and enforce the order by staying further proceedings until compliance with the order.

Effective January 1, 1986, Senate Bill 749 enables the court to order joint custody, a Joint Parenting Agreement, and mediation to determine if joint custody is appropriate. For our program and for other programs being initiated in Illinois, specific statutory authority is now in place.

Structuring an Effective Program

Convinced of the need and of judicial authority to establish a court-referred custody and visitation mediation service, we put our plan into action. The first step was for the authors to present their concept to the McLean County Bar Association in February of 1984. Encouraged by the receptivity of the audience, we planned the creation of a local task force of volunteers to propose a mediation program, set standards and operating procedures, and organize a local training program for professionals interested in becoming mediators. This task force was sponsored by the McLean County Mental Health Association. The

task force of eleven human service professionals, four attorneys, Judge Knecht, Dr. Hale, and Judy Buchanan (President of the Mental Health Association) worked from May, 1984 through March, 1985 accomplishing their goals. A three-day training program utilizing local legal authorities and nationally recognized mediation trainers affiliated with the Association of Family Conciliation Courts was conducted in January, 1985. Twenty-five registrants paid a registration fee of $125 (our only source of funding for the program) and completed the local training. A second training program approved by the task force for our program and later approved by the Academy of Family Mediators was an academic credit course taught through Illinois State University Home Economics Department by Dr. Hale.

A review committee from the task force accepted resumes from professionals requesting inclusion on the court-referred list. Previously established criteria similar to the Academy of Family Mediators membership requirements were used to review applicants. An appeal process was available to those rejected. Operating procedures and standards (See Appendix) adapted from the Illinois Bar Association recommended guidelines were finalized and distributed to judges and attorneys, along with a list of approved mediators. Complete resumes of all mediators are in a looseleaf notebook at the Circuit Clerk's office and are available for review by anyone interested in utilizing the program. Service providers cooperating in the system include agency personnel from a Family Services Association center, Catholic Social Services, a

large Protestant pastoral counseling center, a university student counseling center, a center serving mentally handicapped persons and their families, a mental health center, and a social services unit of a hospital, as well as private practice individuals from backgrounds in family counseling, law, psychiatric nursing, neighborhood dispute resolution, social work, and school psychology. The total number of mediators on the court-referral list is now 23 (2 of these are located outside of McLean County but desired to participate with our group). A unique feature of our court-referred program is the variety of professional backgrounds, including law, represented on our approved referral list. Our program is truly a community-wide cooperative effort from virtually every related professional discipline in our community.

The court-referred program began officially on April 1, 1985. At that time, the four McLean County circuit court judges hearing divorce cases began referring contested custody/visitation original and post-decree cases to mediation. The clients must participate in a minimum of three hours of mediation in attempt to resolve their conflicts without litigation. A report form from the mediator to the judge indicating that the clients participated in mediation is required before a trial hearing date can be scheduled. Three judges use a court rule for all contested child-related cases. Clients/their attorneys select the mediator from the approved list with no rotation system enforced. If the clients cannot agree, the mediator is selected by the judge.

Factors contributing to the successful initiation of this program include strong support of one judge initially; cooperation and support from local attorneys; a cooperative united attitude of service providers who firmly believe in the purposes of the program; and public awareness through extensive television, radio, and newspaper coverage. Mediators in the group are participating in monthly continuing education activities including case review, role play critiquing, informational programs, and public education endeavors. The continuing education component was scheduled through December, 1986 with total group educational meetings alternated with small group case review/role play meetings. This structure will be evaluated for effectiveness at the end of each year. However, continuing education was determined by the task force to be an essential component. Since our mediators are scattered throughout the community, planned group meetings seem to be important in maintaining a sense of cohesion to the program as well as providing peer support and training. Group identity was also achieved by adopting uniform procedures for case review, client consent forms for case review and for follow-up client evaluation research, and data collecting forms (See Appendix). Some concern arose about the group's inability to agree upon a uniform fee schedule; however, varying fee structures does not seem to have hampered the program's usefulness and does fit within the individual choice, free market philosophy of our community. Individual fee structures are included in the resumes for public review when mediators are selected. Mediators in the group agreed

to a self-monitoring pro bono policy to serve indigent clients of the court.

Continued efforts at public awareness are necessary. Our January training program was highly publicized with television, radio, and newspaper coverage. Soon after the training program, the authors made a second presentation to the McLean County Bar Association informing them of the plans to launch the program April 1st. The authors continue to make presentations to various community organizations. Copies of the standards and operating procedures are available for pick up at the Circuit Clerk's office; numerous copies have been distributed upon request to interested persons throughout Illinois and in several other states. Client brochures (See Appendix) have been developed and are being distributed throughout the community by attorneys, human service agencies, schools, and churches. Printing of the brochure was financed as a Mental Health Association project.

The proclamation of the court, our most powerful societal governing body, sends a very clear message advocating cooperative decision-making in the McLean County divorce process. Perhaps no conflict situation is as intense as that of divorce; success in promoting healthy conflict resolution in this arena will hopefully lead to success in other areas of society.

Evaluating the Effectiveness

The program was evaluated at the end of the first six months of operation (October 1, 1985). Collecting case record data and learning of needed changes were the primary functions of this

evaluation. Input came from three sources: case termination record sheets kept by individual mediators, personal interviews with attorneys conducted by volunteer mediators, and informal interviews with the McLean County divorce court judges.

Mediator case record sheets were also collected and tallied at the end of the first year of operation (April 1, 1986). Nineteen of the 23 mediators had completed 48 cases since our initial training program in January of 1985. One case had been cancelled and 8 cases were in process. Thus, during the first year of operation, the program received 57 referrals. These referrals came primarily from attorneys. Approximately half of the cases (27) mediated conflicts involved in the initial divorce agreement; 21 cases involved post-divorce conflicts. Both custody and visitation were mediation issues in 40 cases. Agreements were reached through mediation in 29 cases (60%), while agreements were not reached in 19 cases (40%). When agreement was not reached, mediation was most often terminated by the couple. How long the mediation process takes is frequently asked by attorneys. For 6 cases, we had insufficient data; 13 cases had only 1 session; and the remaining 29 cases averaged 4.7 weeks from beginning to ending of the process, with a range from .5 week to 25 weeks for individual cases. The average number of sessions per case was 2.8, with an individual case range from 1 to 9 sessions; the most frequently reported number of sessions was 2. Total number of hours in mediation averaged 4.4 hours per case, with an individual case range of 1 to 12; the most frequently reported number of

hours for an individual case was 3.

In order to identify a sample of attorneys for the first six months evaluation, McLean County divorce files between April 1, 1985 and September 20, 1985 were reviewed. Names for the petitioner attorney and the respondent attorney were recorded from each case. The 25 attorneys whose names appeared a minimum of 5 times were selected for our interview sample. Twelve of the mediators volunteered to conduct individual personal interviews. A structured interview form with detailed instructions was devised by a planning committee. Each of the 25 attorneys was sent a letter on October 1st informing them of the purposes and procedures for our interview project. A packet for each interview containing a blank interview form, a copy of our program operating procedures, a list of approved mediators, and 25 copies of our recently printed client brochures was distributed to the interviewers. This project not only collected valuable data for the program, but also provided an opportunity for mediators to provide attorneys with written information about the program and answer questions they might have.

Eighteen of the 25 interviews were completed by our October 18th deadline. All of the 18 attorneys were familiar with the program to some degree. The most frequently mentioned source of information was judges; the second most frequently mentioned source was Bar Association meetings. Attorney conversations, media, and the Bar Association newsletter were also mentioned as sources of information.

Relevant information concerning the attorneys' family law practices was collected and summarized. The years of practice in family law averaged 13.6, with a range from 3 to 33 years. Attorneys reported an average of 17.2 divorce cases between April 1, 1985 and October 1, 1985; the range was 7 to 60 cases. Of the total number of divorce cases, an average of 13.9 cases were initial filings; an average of 4 cases were post decree custody/visitation cases. When asked if they had handled any contested custody/visitation cases during this six-month period, 3 of the attorneys answered "none" while 15 attorneys had averaged 2.3 cases. Interviewers asked what issue in a divorce case was the most time consuming and tedious to work out: 9 attorneys replied property settlements, 7 replied contested custody, and 2 were not asked.

Thirteen of the 18 attorneys had used the mediation program for at least one case. With a total of 32 mediation cases reported, the average number of cases per attorney was 2.5 cases with a range of 1 to 6 cases. Five of the 13 attorneys had been involved with only 1 case, indicating limited experience with the program at this early stage. Of these 32 mediation cases, 47% were court ordered, 47% were initiated by the attorneys, and 6% were initiated by the clients. Mediators were selected in the following way: 59% by attorneys, 23% by clients, 13% by a combination of methods, and 5% by judges. Success in clients reaching an agreement through mediation was reported as follows: 9 (28%) yes, 13 (41%) no, and 10 (31%) pending. Considering only

completed cases, the agreement rate was 41%, similar to the 44% reported in the mediator case records at the end of the first six months. Informal comments suggested that in many cases where agreements were not reached, mediation was helpful in narrowing issues and dissipating some anger. Expanded experience with the program by mediators and attorneys did increase the percentage of agreements reached to 60% after one year of operation.

Attorneys were asked for open-ended responses about their questions, concerns about the program, suggestions for improvement,and opinions as to the best aspects of the program. Responses are summarized in the following listings:

QUESTIONS FROM ATTORNEYS

1. What happens in the process: initial interview, persuasion techniques during process, unbiased posture of mediator, techniques for uncooperative clients, time required?

2. How can attorneys and clients become better acquainted with mediators before making selections?

3. Who terminates mediation and how are attorneys informed of termination?

4. How is the cost determined, divided between parties, and collected?

5. How many cases are being successfully mediated and will these decisions hold for the clients?

CONCERNS ABOUT THE PROGRAM

1. Occurs too late in the process to avoid engrained anger

2. Can delay the legal process so that it denies clients due access to the legal process, especially when visitation is being denied

3. Time delay necessitates an extensive temporary hearing which is rushed and incomplete, yet influences the final result

4. Some mediators have paper credentials, but lack necessary personal traits

5. Need a better understanding of the process in order to properly inform clients

6. Is not always successful in avoiding trials, and then is an added expense to clients

7. Need court-ordered deadlines for completion so as to avoid mediation being used as a strategic delaying tactic

8. Attorneys need some form of progress reporting

9. Need a screening process and consistent policies to allow for appropriate exceptions to mandated referrals

10. Need a more clear and direct referral mechanism

11. Ethical issues: mediators giving legal advice, religious overtones of some mediators, judges using mediators to do their job, confidentiality of mediation session information

12. Insufficient time to effectively evaluate

SUGGESTED CHANGES

1. Eliminate mandates and make it voluntary

2. Provide a court-ordered time limit and progress reports to control for anyone using the process as a delaying tactic to deny visitation or strengthen a custody case

3. Establish a screening procedure for inappropriate referrals and appropriate exceptions

4. All judges use a consistent policy

5. Judges allow trials to be scheduled before mediation begins, setting one week for the mediator to be selected and an appropriate time limit for mediation to be completed before the trial date

6. Continue to inform attorneys about the procedures of the program through publishing in the McLean County Bar Alert, posting on the judges' bulletin board, speaking at Bar Association meetings, and informal interchanges

7. Allow more experience with the program as it is now operating and then evaluate it for needed change

BEST ASPECTS OF THE PROGRAM

1. Clients more likely to adhere to a mediated agreement than to a court order

2. Mediator is in the best position of anyone to understand the total situation

3. Reduces conflict in the post-divorce parenting relationship

4. Provides an acceptable avenue for clients to vent emotions

5. The delay for mediation provides a healthy cooling off period

6. Reduces trauma for the entire family

7. Avoids some percentage of trials

8. Lightens the judges' schedules

9. Saves time and money for clients who would otherwise go to trial

10. Best way to handle contested custody and visitation issues

11. Attorneys are now more optimistic about the success of the program than in the beginning

Each of the four judges hearing divorce cases in McLean County were informally interviewed. Two of the judges immediately adopted a policy and posted an order mandating that all contested custody and visitation cases participate in mediation as an attempt to resolve the dispute; if mediation were unsuccessful, a trial hearing could be scheduled when the mediator reported to the judge that mediation had been terminated. Another judge is now using a similar policy, though a court order is not formally posted. The fourth judge has not yet ordered mediation, though he intends to use it on an individual case basis; attorneys in some of his cases have voluntarily used mediation without formally reporting that practice to him. Voluntary referral by attorneys

seems to be occurring in all four courts. Judges recalled very few cases being individually ordered to mediation in the courtroom, though our sample of attorneys reported 15 court ordered referrals. Apparently, awareness of court policy is influencing attorneys to make referrals. Judges identified only 6 exceptions being granted, primarily because one party lived in another state which limits the physical feasibility of mediation to a marathon session. Perhaps this marathon approach can be utilized more in the future. Judges agreed that there has been a significant reduction in the number of contested custody/visitation trials scheduled since initiation of the program. Whether mediation is actually reducing the need for trial hearings or merely delaying the scheduling is yet to be determined. The number of successful agreements and the general impression of judges and attorneys support the value of mediation in reducing the need for trials. All the judges were very supportive of the program and satisfied with the way it is operating.

Conclusions

Since our program seems to be working well in most respects, no immediate significant changes are anticipated. The use of mediation as a delaying tactic is a concern voiced by attorneys which must be addressed. Methods for eliminating that abuse of the program will be investigated. The program has developed by voluntary efforts with very little formal structure. In November of 1985, a Steering Committee composed of one member from each of

the four small peer review groups was elected. This group plans and organizes the continuing education program which alternates between total group and small review group meetings and facilitates communication among members of the program. Continued efforts for creative and effective means of informing the legal community and the general public about the workings of the program are essential to continued success. Strategies such as speaking to various groups, distributing written materials, obtaining additional media coverage, and producing a publicly available videotape are taking place.

The McLean County Court-Referred Divorce Mediation Program has been successful in a number of ways. Divorce mediation services are now available, and these services have resulted in approximately 60% of the client couples being able to effectively agree upon the living arrangements for their children without using the adversarial litigation process. Success in divorcing clients reaching agreements or narrowing issues through mediation has resulted in a facilitative professional resource for attorneys in working out total divorce settlements. Our program seems to be doing more than just facilitating a written divorce settlement for families. Awareness of the purposes of our program seems to be promoting a public attitude of cooperative decision making in divorce and social support for fair agreements based on the best interests of the child. Success of the program has provided the authors with encouraging verification of the tremendous potential for volunteer cooperative efforts to bring about social improvements.

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APPENDIX

STANDARDS AND PROCEDURES FOR MCLEAN COUNTY COURT REFERRED DIVORCE MEDIATION

1. Definition

For purposes of these standards and procedures, divorce mediation is defined as a procedure whereby individuals submit custody and visitation disputes to qualified third participants, not to decide the disputes, but to impartially assist the participants to achieve their own fair settlement. While divorce dispute mediation may be viewed as an alternate means of custody and visitation resolution, it is not a substitute for independent legal advise, full disclosure of relevant facts, and consent which is fully informed in the perspective of local legal norms.

2. Subject Matter

Court referred mediation will be limited to child custody and visitation issues.

3. Initial Advise of Mediators

At the initial orientation session mediators should minimally advise the mediating participants as follows:

a) Neither therapy nor marriage counselling are part of the mediator's function.

b) The participants should not begin divorce mediation unless thay are agreed that their marriage is to be dissolved and that they are submitting for mediation of the disputed issues in connection with child custody and visitation.

c) The issues to be mediated should be delineated from the outset.

d) The proposed resolution of the mediated issues will be documented in a written summary. This summary will form the basis of the formal mediated agreement presented to the court for approval.

e) No legal advice will be given by the mediator.

f) An attorney-mediator will not act as attorney for either or both participants and no attorney-client relationship will be formed.

g) Each participant is strongly encouraged to obtain independent legal counsel to assist and advise him or her throughout the mediation. Any documents used in the mediation should be available to such counsel.

h) Independent legal counsel will not be present at any mediation session without the agreement of the participants.

i) If independent legal counsel is not obtained the court must be so advised when the mediated agreement is presented for approval. The participants should be aware that the court may refuse to approve the agreement if it does not meet legal standards.

j) The mediation can be suspended or terminated at any time on the request of either participant or on the request of the mediator. The mediator shall suspend or terminate the mediation if it appears that either participant is acting in bad faith, that the best interests of minor children are not being given priority, that either participant does not fully understand the negotiations, or that the

prospects of achieving a responsible agreement appear unlikely.

k) The costs of the mediation must be agreed upon, as well as the method and responsibility for payment. The participants should also be advised that experts may be employed to assist in establishing values and other technical information.

l) The mediator shall not voluntarily disclose any of the information obtained through the process of mediation without the consent of both participants, except when nondisclosure would appear to create a clear and imminent danger to an individual or to society.

m) The mediator shall reach an understanding with the participants as to whether the mediator may communicate with either participant or their independent legal counsel or with any third parties to discuss the issues in mediation in the absence of the participants. Any separate communication which does occur should be communicated to the participants at the first opportunity.

n) The mediator should assess the ability and willingness of the participants to mediate at the orientation and throughout the process and shall advise the participants if the prospects of successful mediation appear unlikely.

4. Memorandum of Understanding

At the initial session the mediator should provide the participants with a written statement or memorandum of understanding which includes all of the foregoing information in paragraph 3 and any other provisions which are appropriate. This memorandum should be taken and studied by the participants separately. There should be adequate time allowed for each participant to consult with independent legal counsel before the second session begins. At the second session the mediator should determine whether any modifications of the memorandum are desired. The memorandum as modified should be signed by the participants if they wish to proceed with the mediation. This is not a binding contract but a memorandum of mutual understanding and expectations.

5. Minimum Qualifications of Divorce Dispute Mediators

a) In the area of education mediators are required to have a law degree or a master's degree in a mental health field or the equivalent in a related discipline.

b) Two years of work experience in the professional field following the degree is required.

c) Specilized mediation training to include:
   1) Awareness training in: child development and family relations; family law; conflict resolution theory and mediation process.
   2) Three-day training program organized by the Task Force or its equivalent.

d) Continuing education by participation in monthly meetings which incorporate peer supervision.

6. Attorney-Mediators

Attorneys who act as mediators shall make it clear to the participants that they are not representing either or both of them and that no attorney-client relationship

is being formed with either of them. They may bring impartial legal information to the process and may define legal issues, but they shall not advise either participant so as to direct the participants' decision on a given issue or advocate the individual interests of either participant. The participants must be referred to independent legal counsel for that advice or advocacy. Legal information brought to the mediation process by an attorney who represents neither participant is not a substitute for independent legal counsel. The attorney-mediator may draft the mediated agreement if requested to do so by the parties, but may not represent either party before a court in connection with the matter.

7. Non-Attorney-Mediators

Any attempt of non-attorney-mediators to interpret law, to advise participants of their legal rights and responsibilities, to direct decisions on issues which require a knowledge of the law, or to draft the mediated agreement constitutes the illegal practice of law. The mediator has a continuing duty to advise participants of the need for independent legal counsel, and that an agreement reached without independent legal counsel may not be approved by the court if it does not meet legal standards.

8. Impartiality of Mediators

In order to avoid the appearance of impropriety, a mediator who has represented or has had a professioanl relationship with either participant prior to the mediation may not mediate the dispute unless the prior relationship is disclosed and each participant consents to the mediator notwithstanding the prior relationship. A mediator who is a mental health professioanl shall not provide counselling or therapy to the participants during the mediation process. An attorney-mediator may not represent either participant in any matter during the mediation process or in a dispute between the participants after the mediation process. Impartiality is not the same as neutrality in questions of fairness. The mediator should discuss the issues with a concern for fairness throughout the mediation and should avoid unreasonable positions on the part of either participant. The mediator has a duty to communicate to the participants his or her bias on any mediated issue.

9. Referrals by Mediators

While mediators must encourage the participants to obtain independent legal counsel, they shall not refer them to specific attorneys or attempt in any other manner to influence their choice of counsel because such referral relationships may adversely affect the attorney's exercise of independent professional judgement on behalf of the participant and may create the appearance of impropriety. Mediators may, however, encourage the participants to use any attorney referral services provided by bar associations or the courts. Mediators should refer participants to other professionals when appropriate for mental health counseling.

10. Mediation Disclosures

A precondition to any mediated settlement should be a full and complete disclosure of all relevant facts to the same degree as would be expected in the normal discovery process, unless the participants both specifically agree to a lesser disclosure.

11. Settlement Criteria and Standards

The mediator should promote equal understanding by the participants and should refer each of them to independent legal counsel or for expert consultation in their lack of knowledge is impeding the balance of the negotiation. If the mediator is an attorney the participants should be cautioned that the mediator cannot advise them about or serve their individual interests, and that any mediator comments in respect to the law are not a substitute for independent legal advice. The participants shall be advised that while either participant can settle for less or give more on a particular issue with respect to their legal rights and obligations, he or she cannot do so without informed consent which is best achieved with the advice of independent legal counsel. The participants must be advised that an unreasonable agreement may not be approved by the court and that an unconscionable agreement will not be approved by the court.

12. The Best Interests of Children

The mediator has a duty to promote the best interests of children involved in the mediation even when the participants agree to a resolution which is not in the children's best interest. The mediator has a duty to inform the participants where the children's best interests are being overlooked or not given their proper priority.

13. The Suspension or Termination of Mediation

A mediator has a duty to suspend a mediation when it appears that either participant is unable or unwilling to reach a reasonable agreement or when the mediator believes a participant does not understand the substance or implications of the agreement. In the event of a suspension, the mediator may suggest to the participants that either or both are in need of professional consultation outside the mediation process.

A mediator shall terminate a mediation when the mediator believes a reasonable agreement cannot be reached, when the mediation process appears to be harmful to either participant, when either participant is acting in bad faith, or when the best interests of minor children are not being given proper priority.

14. The Attorney's Duty When Representing a Party to a Mediation

An attorney has the same duties to the client who is participating in mediation as to the client in any other matter, whether the attorney is engaged before or after a mediated agreement has been reached. Discovery should be employed to the point where the attorney is satisfied that reasonably full disclosure has been achieved, unless the client specifically directs the attorney to the contrary. The client should be advised of all relevant options and alternatives and the ramifications thereof based on the available information. The client should be advised of the potential results of the litigation of a particular issue in order to formulate an informed consent in connection with the mediated agreement. If the agreement for some reason appears unreasonable or unconscionable, the attorney should so advise the client. Where only one or neither participant was represented by independent legal counsel during mediation, the court should be so advised when approval of the mediated agreement is sought.

15. Mediation Fees

The mediator should explain the fees for mediation and reach an agreement with the

participants for payment at the orientation session. A mediator shall not charge a contingency fee or base the fee in any manner on the outcome of the mediation process. A flat fee for the entire mediation may be charged as agreed at the outset. Hourly rates may be on a sliding scale taking into account the financial means of the participants or the complexity of the subject matter, but once established the rate shall be uniform throughout the process. No bonus should be given or penalty charged in connection with the success or failure of the mediation.

16. Court Mandated Mediation Program

The judiciary may mandate mediation to assist in the disposition of child custody and visitation disputes. The participants may be required to attend a minimum 3-hour evaluation proceeding to be completed within 30 days in order to determine whether their dispute can be successfully mediated. Other than attendance at such evaluation proceedings, any further participation should be voluntary and consistent with the foregoing standards and principals.

a) Referral Procedure:
The court-referred mediator must be selected from a list of approved mediators available in the Circuit Clerk's office. Complete resumes and individual fee schedules are available for review in the Circuit Clerk's office. Pro bono mediation will be done on a voluntary rotating basis for those cases who file a "Petition for Leave to File as a Poor Person" and whose petition has been allowed by the Court. The attorneys and clients in a given case must agree on a mediator from the Court-approved list. Each attorney should inform the client to contact the mediator directly to schedule appointments. Each attorney may provide a letter to the mediator which provides information with regard to the legal status of the case, including what orders have been entered by the Court, whether temporary or permanent in nature, how long this matter has been in litigation, and what are the unresolved legal issues. The letter which is provided by the attorney to the mediator shall not be confidential and may be disclosed by the mediator to both parties. The attorney and mediator shall have no further communication with regard to the mediation process.

b) Reporting Procedure:
Upon the reaching of an informal agreement through the mediation process, the mediator will draft a memorandum of understanding for review by the participants. Upon final review, a copy of this memorandum will then be sent to each participant and each respective attorney. The attorneys will review the memorandum, give advice and opinions, and draft a formal agreement to submit to the court. The mediator will submit a report form to the court and to the attorneys following the completion/termination of mediation. The report includes only the names of participants, the dates and hours of mediation, whether or not an agreement was reached, and the name of the mediator; no content of the mediation sessions will be reported to the court. The mediator may not be called as a witness in litigation.

c) Inappropriate Referrals:
Couples should not be referred to mediation if there are allegations of child abuse in the petition for dissolution. If it is alleged, or is evident to the Judge that either of the parties suffers severe emotional difficulties or impairment, or that one is chemically dependent, so that he/she is not capable of making or complying with an agreement, mediation should not be attempted.

MCLEAN CO. DIVORCE MEDIATION PROGRAM: TERMINATION RECORD

Please complete this form following the termination of each mediation case that you conduct. This information will be used to help evaluate the program.

1) Referral source: ( ) Attorney ( ) Judge
( ) Self-referred ( ) Other:_____

2) Length of time couple was ( ) separated or ( ) divorced prior to the beginning of mediation:_____

3) When did mediation begin: ( ) prior to dissolution hearing
( ) after dissolution hearing but prior to final court settlement
( ) after final initial court settlement: post-decree

4) Issues mediated: ( ) custody ( ) visitation ( ) both

5) What unresolved issues, other than custody/visitation, surfaced during mediation sessions which could have been mediated?

6) Did mediation result in an agreement by both parties?
( ) yes: ( ) written or ( ) verbal
( ) signed or ( ) unsigned
( ) no

7) If no agreement was reached, was mediation terminated by:
( ) mediator ( ) couple ( ) wife ( ) husband
( ) all agreed to terminate

8) Total number of sessions in mediation:_____

9) Total number of hours in mediation:_____

10) Time span required in mediation process:

Date of initial mediation session:_____

Date of termination session:_____

_____
Mediator

October 1985 revised form

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MCLEAN COUNTY DIVORCE MEDIATION PROGRAM
CASE REVIEW PROCEDURES

The first priority of this activity is to protect the anonymity of clients, accomplished by the following:

1. Signing intention to adhere to the definition of confidentiality described in the State of Illinois Mental Health Code.

2. Using fictitious first names and no last names.

3. Altering/minimizing use of identifying data, such as place of employment, clients' attorneys.

4. Obtaining a release of information from clients, using the McLean County Court-Referred Divorce Mediators' Release of Information form. This form states that information will be used for education purposes. Information will be shared only with a small group of case review mediators.

Purposes

Given that we are all inexperienced mediators continuing to learn about the mediation process and its clinical application, the purposes of case review are:

1. To enhance the development of mediation skills by benefitting from each other's experiences.

2. To assist each other to analyze, strategize, and evaluate difficult cases.

Methodology

1. Case presentation is voluntary

2. Attendance is limited to mediators on the court approved list.

3. Cases are presented to a standing small group composed of representatives from the various disciplines, with group membership effective until January 1, 1986.

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MCLEAN COUNTY DIVORCE MEDIATION PROGRAM

PERMISSION FOR CONSULTATION/EDUCATION/TRAINING/RESEARCH

We, _____ and _____ authorize _____ to use our dispute situation for the purposes of consultation, education, training, or research. We understand that all identifying information will be disguised to insure confidentiality. We understand that the dispute story will be used solely for professional education and practice enhancement.

We understand that refusal to sign this permit will not hamper the mediation process.

This permit is valid for one year.

_____ party

_____ party

_____ mediator

_____ date

_____ expiration date

MCLEAN COUNTY DIVORCE MEDIATION PROGRAM

RESEARCH PARTICIPATION RELEASE

As a participant in divorce mediation in McLean County, I am willing to complete a follow-up questionnaire that will be mailed to me concerning my satisfaction with mediation proceedings. I understand that the information I will provide will be kept confidential and will be used for evaluation research purposes only.

Name:_____
(Please print)

Address:_____

_____

_____

Signature:_____

SUMMARY OF MEDIATION CASE RECORDS FOR
McLEAN CO. COURT-REFERRED DIVORCE MEDIATION PROGRAM
April 1, 1985 - April 1, 1986

TOTAL CASES REFERRED = 57

48 = COMPLETED CASES *used in data summary below

1 = CANCELLED CASES

8 = IN PROCESS CASES

REFERRALS:

32 BY ATTORNEYS

15 BY JUDGES

1 BY CLIENTS

TIMING OF MEDIATION IN DIVORCE PROCESS:

27 (56%) INITIAL SETTLEMENT

21 (44%) POST-DECREE MODIFICATION

AGREEMENT RATE:

29 (60%) = AGREEMENT REACHED

19 (40%) = AGREEMENT NOT REACHED

LENGTH OF TIME FOR PROCESS:

2.8 = AVERAGE NUMBER OF SESSIONS

(RANGE = 1-9; MODE = 2)

4.4 = AVERAGE NUMBER OF HOURS

(RANGE = 1-12; MODE = 3)

4.7 = AVERAGE WEEKS TAKEN FOR 29 CASES

(RANGE = .5-25; MODE = 4)

[13 CASES HAD ONLY 1 SESSION;
6 CASES HAD INSUFFICIENT DATA]

McLean County Court Referred Divorce Mediation

Mediation helps parents make decisions about their children following separation and *divorce.*

As you consider custody and visitation plans....

How will you restructure your present family into two new family units?

How will you resolve the complex issues that will shape your children's lives?

How can you focus on your children's needs while developing a workable parenting plan?

When children are involved, family relationships need to be restructured so that effective parenting continues even though the marriage relationship has ended. Mediation allows and encourages the parties to separate from each other in a positive and responsible way while protecting the children in the process.

How mediation works....

A trained mediator guides you through the process of working together to reach agreement. You will each explore your needs, wishes and goals for the future.

The mediator will help you....

- **Clarify the issues**
- **Identify possible options**
- **Develop a parenting plan that will work for you**

Mediation benefits parents....

- **Participants negotiate settlements themselves instead of having decisions imposed on them by the court.**
- **The process often requires less time and incurs less costs than contesting matters in court.**
- **Mediation focuses on the decisions to be made rather than on the emotional aspect of the separation or divorce.**

Mediation benefits children....

- **When parents cooperate the children have a better chance for a secure and satisfying life.**
- **Parents can ease the hurt for children by going out of their way to work together even when they feel angry.**
- **Parents can prepare children for changes that will occur.**
- **Children can feel free to love both parents.**

It is a myth that parents who were not able to get along as marriage partners cannot work together as parents. They can!

How much time does mediation take?

The time needed in mediation varies according to the complexity of the issues and the attitudes of the parties. Most couples reach an agreement within three to eight hours. Court referred mediations will require a minimum of three hours.

Will you need an attorney?

The mediator will not give legal advice. The mediator will refer each client to his/her attorney to discuss legal issues that arise during mediation.

The mediator will provide a memorandum of understanding based upon the agreement of the parties, which they may take to their respective attorneys. The attorneys will review the memorandum, give advice and opinions, and draft a formal custody and visitation agreement to submit to the court. When your agreement is submitted to the judge the court will determine remaining unresolved issues.

How is a mediator selected?

The resume and fee schedule of each court approved mediator is available at the McLean County Circuit Clerk's Office. This information may be helpful in your selection of a mediator.

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Is There A ? In Your Children's Future

Mediator's Name: _____

Address: _____

_____

Phone: _____

Appointment Date: _____

Appointment Time: _____

Brochure a service of
Mental Health Association
in
McLean County